NO. 34837-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JASON WILLIAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable John D. Knodell, Judge
The Honorable David G. Estudillo, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THIS COURT SHOULD DECIDE WHETHER INSTRUCTION 26 DEPRIVED WILLIAMS OF HIS RIGHT TO A FAIR TRIAL.

a. Williams's objection to the instruction preserved the issues on appeal.

The State wants this Court to avoid deciding whether the revenge/retaliation instruction (Instruction 26) deprived Williams of his right to fair trial. To that end the State claims Williams's objection to the instruction was insufficient under CrR 6.15(c) to preserve Williams's challenges to the instruction. The State is wrong.

The underlying policy of the rule (CrR 6.15(c)) is to encourage the efficient use of judicial resources by providing the trial court with the opportunity to correct the erroneous instruction. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (citing State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). An objection to an instruction is sufficient if the trial court understands the basis of the objection. Crossen v. Skagit County, 100 Wn.2d 355, 358-359, 669 P.2d 1244 (1983).

The State correctly notes that the jury instructions were discussed piecemeal during the course of the trial. Brief of Respondent (BOR) at 4, n.4. When the State first proposed the non-standard revenge/retaliation instruction Williams objected. RP 2367. When the court finally

addressed the instruction Williams again objected. Williams noted the instruction was improper because was based on dicta in State v. Studd[1] and that there was no assertion in that case that "anger does not justify a self-defense." Williams also noted that the instruction was a comment on the evidence ("it implies from the court, of course, that maybe Mr. Williams is angry") and that the standard self-defense instructions properly allowed the State to argue anger "is not a sufficient reason to shoot somebody." RP 2475-2476.

Williams' objection to the instruction sufficiently apprised the trial court that the non-standard instruction was erroneous because it was a misstatement of the law based on dicta, was a comment on the evidence, and in the context of the other self-defense instructions was not necessary to the State's theory of the case. Further, despite the objection, the trial court believed the instruction was required as a matter of law indicating the court intended to give the instruction regardless of any arguments to the contrary. RP 2479.[2] This is not a case where defense counsel failed to object to the challenged instruction or where the trial court was not given

[1] 137 Wn.2d 533, 550, 973 P.2d 1049 (1999).

[2] THE COURT: Okay. So given the language that I just read from and directly quoted from State vs. Studd, I do find it to be what the law is, because that's what the Supreme Court has stated the law is. And so it appears to be an appropriate instruction as written in Studd. And so if that fifth proposed instruction mirrors what the instruction is in Studd, again, the Supreme Court has said it's a correct statement of the law. So based on that ruling, we can use that instruction, but it has to mirror the instruction that was cited to in Studd. RP 2479.

the opportunity to correct the instructional error. On this record CrR 6.15(c) does not foreclose Williams's challenge to the instruction on the grounds raised on appeal.

b. The giving of Instruction 26 was manifest constitutional error that can be raised for the first time on appeal.

Even if Williams had not objected, the instruction was constitutional error that can be raised for the first time on appeal. Manifest errors that affect constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). For an argument to fall within RAP 2.5(a)(3), the appellant must identify a constitutional error and show how the alleged error actually affected the appellant's rights at trial. O'Hara, 167 Wn.2d at 98, (quoting State v. Kirkman, 159 Wn.2d 918, 926 27, 155 P.3d 125 (2007)).

Constitutional error is manifest if the appellant can show actual prejudice. To establish actual prejudice, the appellant must plausibly show the error had "practical and identifiable consequences in the trial of the case.'" O'Hara, 167 Wn.2d at 99 (quoting Kirkman, 159 Wn.2d at 935). If shown, the State bears the burden to prove harmlessness beyond a reasonable doubt. State v. Gordon, 172 Wn.2d 671, 676 n.2, 260 P.3d 884 (2011).

In the context of self-defense instructions an unpreserved claimed error is analyzed on a case-by-case basis. O'Hara, 167 Wn.2d at 104. The O'Hara Court noted some instructional errors are "deemed automatically of a constitutional magnitude[,]" including "directing a verdict, shifting the burden of proof to the defendant, failing to define the 'beyond a reasonable doubt' standard, failing to require a unanimous verdict, and omitting an element of the crime charged." Id. at 103. The Court went on to note:

> In contrast, instructional errors not falling within the scope of RAP 2.5(a), that is-not constituting manifest constitutional error-include the failure to instruct on a lesser included offense and failure to define individual terms. In each of those instances, one can imagine justifications for defense counsel's failure to object or where the jury could still come to the correct conclusion.

O'Hara, 167 Wn.2d at 103.

A to-convict instruction's omission of elements is not the only type of instructional error implicating due process concerns regarding the jury's deliberative process. See State v. Johnson, 125 Wn. App. 443, 456-57, 105 P. 3d 85 (2005) (the improper removal of an otherwise competent juror from the deliberative process constitutes "manifest constitutional error"). A misstatement of self-defense law can affect the deliberative process by, for example, overstating the degree of harm perceived necessary to justify the act of self defense, which unfairly increased the

defense burden to prove the act was justified and reduces the State's burden to disprove the act was justified, and therefore may be raised for the first time on appeal. State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The error in Instruction 26 is not like a failure to instruct on a lesser included offense, or failure to define a term. The instruction instead affirmatively misled the jury because it failed to adequately convey the law of self-defense and shifted the burden of proof. The instruction also constituted an impermissible judicial comment on the evidence. Brief of Appellant (BOA) at 18-30.

For example, Instruction 26 told the jury that "self defense is an act of necessity" thereby removing any subjective element from the jury's evaluation of self-defense and improperly directing the jury to find that Williams' acts were in fact necessary. BOA at 21-24. It further told the jury that, "[t]he right of self-defense does not permit action done retaliation or revenge." That language had the effect of telling the jury that even if it believed Williams reasonably fear that he and his wife faced imminent harm, if Williams was also motivated by retaliation or revenge it need not even consider whether his acts were reasonable or whether the State proved the absence of self-defense because the law did not allow Williams to claim self-defense or defense of another. Id. at 24-27. And,

the instruction was an improper judicial comment on the evidence because a reasonable juror would necessarily conclude the judge believed Williams in fact acted out of revenge or in retaliation. Id. at 28-29.

Thus, Instruction 26 violated Williams' due process right to a fair trial because it confused the relevant legal standard, was misleading, shifted the burden to Williams to prove his acts were not motivated by revenge or retaliation, and was an improper judicial comment on the evidence. Contrary to the State's contention, Instruction 26 is an error of constitutional magnitude.

The consequence of improper instruction was to deny Williams's right to have the jury consider his defenses under the proper legal standards. Thus, the error was manifest.

This Court should reject the State's invitation to avoid deciding whether Instruction 26 denied Williams the right to a fair trial. Williams properly preserved his challenges to the erroneous instruction and even if he had not the instruction was a manifest constitutional error that can be raised for the first time on appeal.

2. THE ERRONEOUS REVENGE/RETALIATION INSTRUCTION DENIED WILLIAMS HIS RIGHT TO FAIR TRIAL BECAUSE IT CONFUSED THE LEGAL STANDARDS OF SELF-DEFENSE AND WAS AN IMPERMISSIBLE COMMENT ON THE EVIDENCE.

The State maintains that the instruction was a correct statement of the law and in the context of the other self-defense and defense of another instructions and arguments of counsel, jurors could not have been confused about the applicable law or legal standards. BOR at 8-14 (addressing subjective element of a self-defense claim); BOR at 15-18 (addressing the revenge/retaliation language). The instruction was not a correct statement of the law because it allowed the jury to convict Williams even if he reasonably believed his acts where necessary to protect himself and his wife. That other instructions correctly stated the law did not somehow ameliorate the problem engendered by the erroneous instruction.

a. Instruction 26 improperly confused the legal standards of self-defense and defense of another.

Instruction 26 unequivocally told the jury that self-defense is an "act of necessity." To the average person "necessary" is synonymous with "unavoidable" or "indispensible." Webster's Third New Int'l Dictionary, 11510 (1993). A self-defense instruction that leaves it to the jury to decide whether force was necessary has long been held as a misstatement of the

law of self-defense. See State v. Miller, 141 Wash. 104, 105, 250 P. 645 (1926) (where the court reversed an assault conviction because the jury was instructed that self-defense required that the use of force be necessary); State v. Wanrow, 88 Wn.2d 221, 240 559 P.2d 548 (1977) (same citing Miller). By instructing the jury that self-defense is an act of necessity, the jury would have concluded that unless it objectively believed Williams's act of shooting at his assailants to protect himself or his wife was unavoidable his self-defense and defense of another defenses were legally invalid. That is contrary to the law, which requires "the defendant's actions are to be judged against [his] own subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d at 240.

The instruction also unequivocally told the jury "[t]he right of self-defense does not permit action done in retaliation or revenge." Williams argued in his opening brief that the instruction was a misstatement of the law because it effectively told the jury that if he acted in retaliation or out of revenge, even if he also feared for his and his wife's life, he was not entitled to claim self-defense or defense of another. BOA at 24-27.

The State appears to claim that because Williams did not argue that he fired out of fear for both himself and his wife and out of revenge or retaliation for the earlier beating he received, the erroneous instruction had

no practical consequence. BOR at 15. ("Nothing in the record indicates Instruction 26 effectively told the jury Williams had no right to claim self-defense if it found his acts were done in reasonable fear of imminent serious harm but were also motivated by anger."). The State misses the mark.

It does not matter that Williams did not testify he was angry when fired the shots. The instruction unequivocally told the jury that Williams's defenses were legally unavailable to him if he acted out of revenge or retaliation. The instruction did not qualify that Williams's defenses were unavailable only if that was his sole motivation. Given the beatings he took and the assault on his wife that he witnessed before he shot at the assailants, it strains credulity to assume jurors did not believe Williams acted in part out of revenge or in retaliation. Once that reasonable inference was made, the instruction told the jury the defense of self-defense was unavailable. That, however, is not the law. BOA at 24-27.

Deadly force may be used in self-defense and defense of another if the defendant reasonably believes he or another is threatened with death or great personal injury. State v. Walden, 131 Wn.2d 469, 474, 932 P.2d 1237 (1997). The defense evidence established Williams reasonably believed that he and his wife were threatened with death or great personal injury. See BOA at 14-18. Even though it was reasonable for the jurors to

infer Williams wanted revenge, if jurors also believed he acted out of fear that he and his wife would face imminent death or injury, despite his anger and desire for revenge or to retaliate, his defenses were legally valid. The infirmity with Instruction 26 was that it told the jury the defenses were nonetheless not valid.

Self-defense instructions read as a whole must make the relevant legal standard manifestly apparent to the average juror. State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996) (internal quotation marks omitted) (quoting State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (quoting State v. Painter, 27 Wn. App. 708, 713, 620 P.2d 1001 (1980))), *abrogated on other grounds by* State v. O Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). At best when viewed in conjunction with the other instructions, instruction 26 was confusing, misleading and ambiguous. At worst instruction 26 was a misstatement of the law. In either case the inclusion of the instruction did not make the relevant legal standard manifestly apparent to the average juror. See State v. Painter, 27 Wn.App. 708, 713, 620 P.2d 1001 (1980), *review denied*, 95 Wn.2d 1008 (1981) (trial court's incorrect self-defense instruction is still error even when the instructions are read as a whole).

The court also instructed the jury that it "must disregard any remark, statement, or argument that is not supported by the evidence or the

law in my instructions. CP 46 (Instruction 1). Jurors are presumed to follow the court's instructions. Diaz v. State, 175 Wn.2d 457, 474, 285 P.3d 873 (2012). It must be presumed that the jury disregarded arguments by counsel that conflicted with Instruction 26. Furthermore, instruction No. 1 told the jury "[t]he order of these instructions has no significance as to their relative importance. They are all important. During your deliberations, you must consider the instructions as a whole." CP 47. Given this instruction it is not possible to know if the jury considered instruction 26 dispositive.

Moreover, when jury instructions read as a whole are ambiguous, the reviewing court cannot assume that the jury followed the legally valid interpretation. State v. McLoyd, 87 Wn. App. 66, 71, 939 P.2d 1255 (1997), *aff'd sub nom.*, State v. Studd, 137 Wn.2d 533, 73 P.2d 1049 (1999). And, a self-defense instruction can be correct under almost all circumstances but still insufficient under the particular facts of a case by failing to make the legal standard manifestly clear. State v. Irons, 101 Wn. App. 544, 552-553, 4 P.3d 174 (2000) (citing State v. Myers, 96 Wash. 257, 263, 164 P. 926 (1917)).

Here, it cannot be said with any certainty that in this case a holistic reading of the instructions resolved the ambiguity caused by Instruction 26's misstatement of the law.

b. Instruction 26 was an impermissible comment on the evidence.

The State cites Studd for the proposition Instruction 26 was not a judicial comment on the evidence. BOR at 19 (citing State v. Studd, 137 Wn.2d at 550). Studd was a consolidated appeal involving multiple defendants. In the case involving one of the defendants, Cook, the trial court gave the same non-standard instruction that was given in this case. Studd, 137 Wn.2d at 550. Cook argued on appeal that the instruction unduly emphasized the State's theory on the case. Id. The Studd Court, citing its decision in State v. Janes, 121 Wn.2d 220, 240, 850 P.2d 495 (1993), rejected the argument that the instruction improperly emphasized the State's theory and then without any analysis or factual context the Court also opined in dicta that the instruction was not a comment on evidence. Studd, 137 Wn.2d at 550.

The facts and issues in Janes, where the revenge/retaliation language first appears in a Washington appellate decision, reveals that the Court did not address the language in the context of whether it would constitute an improper comment on the evidence if used as a jury instruction in a particular case. In Janes, there was evidence that the victim had physically and emotionally abused the defendant, his stepson, for over 10 years. Janes, 121 Wn.2d at 223. One afternoon, the defendant

laid in wait for his stepfather, then shot and killed him. Id. at 224-25. On appeal, the Court addressed (1) whether expert testimony regarding the "battered child syndrome" is admissible in appropriate cases to aid in proofing of self-defense, and (2) given the history of abuse and other circumstances, whether there was sufficient evidence that the defendant was in imminent danger of grievous bodily harm so as to warrant a self-defense instruction. Id. at 232-41.

The revenge-retaliation language was in that part of the Janes opinion where the court was discussing the objective aspect of the reasonable person standard of self-defense:

> "The objective aspect also keeps self-defense firmly rooted in the narrow concept of necessity. No matter how sound the justification, revenge can never serve as an excuse for murder. "[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge." People v. Dillon, 24 Ill. 2d 122, 125, 180 N.E.2d 503 (1962).

Janes, 121 Wn.2d at 240.

The Janes Court went on to hold, however, that the trial court should have considered the defendant's history with his stepfather before denying the defense request for a self-defense instruction. The Court noted that "the trial court may have given undue consideration to the length of time between the alleged threat and the homicide; the justifiable homicide statute requires imminence, not immediacy." Janes, 121 Wn. 2d at 242.

It is clear from the decision in Janes that the Court's concern was reconciling the common sense and legally correct proposition that a person who is the first aggressor or acts out of revenge or retaliation cannot claim self-defense with the statutory requirement that the slayer reasonably believe he or she is in danger of imminent harm. Id. at 237 (citing RCW 9A.16.050). Like in Studd, the Janes Court did not analyze whether the revenge/retaliation language could constitute a comment on the evidence in a particular case.

Here, the shooting occurred within minutes following the beatings Williams received and the assault on his wife. There was no direct evidence that Williams shot at the assailants out of revenge or retaliation because of the assaults he or his wife suffered. Under the facts in this case, jurors would have reasonably interpreted the instruction as an indication the judge believed that Williams nonetheless acted in retaliation or out of revenge and therefore under the express and plain language of the instruction his defenses of self-defense or defense of another was legally unpermitted.

The State's other argument, that jurors were instructed to disregard such comments, is not determinative. BOR at 20; See State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968) (the Court held an instruction requiring jury to disregard comments of court and counsel was

incapable of curing the prejudice). Here, because the instruction told the jury that an act done out of revenge or retaliation legally made self-defense unavailable, the standard instruction telling the jury to disregard any remarks not supported by the evidence did not cure the prejudice engendered by the comment.

c. Instruction 26 deprived Williams of his defenses.

The issue in this case is whether the revenge/retaliation instruction denied Williams the right to a fair trial. The State explained that its reason for requesting the instruction:

> We think it's an appropriate instruction to give in this case. I think it's appropriate to give it in cases where there is mixed facts or there's mixed testimony about first aggressor. In this situation we have two or three different times where there is an aggressor, and then there's a break in the assaults, and then it takes up again and then there's a break, and then it takes up a third time. The state's theory is that this third time, it's not justifiable action, because there's no -- there's no necessity and the response is unreasonable. I think in cases where there's -- it's mixed who the actual first aggressor is, this is an appropriate instruction because it helps the jury understand that self-defense is different than retaliation or revenge. I could tell the court that there's a recent unpublished case that approved the instruction. The Court of Appeals from August 2016. But it's unpublished. They don't give a lot of -- there are many other issues in that case, but that was a case -- that case was involving gang activity and assaults and retaliations and more assaults and retaliations on the second round of assaults. But I can tell the court that this instruction was given recently in a trial in Grant County, I believe before a different court here in superior court in a felony case where there was also a mixed question of who

> the actual first aggressor was. So the state feels that this is not -- we're not changing the law of self-defense, we're not changing the law of justifiable homicide, but this is a corollary and that it helps explain the reasonableness factor and the necessity factor, and we're going to propose it as it is.

RP 2476-77.

It is clear from its argument that the State's theory was that after the two assaults on Williams that it was not objectively reasonable for Williams to retrieve the gun and fire at his assailants ("The state's theory is that this third time, it's not justifiable action, because there's no -- there's no necessity and the response is unreasonable.").[3] The purported reason for requesting the revenge/retaliation was to help "the jury understand that self-defense is different than retaliation or revenge." There is no reason to believe the jury needed that help. More to the point, it is prejudicial error to submit an issue to the jury when there is not substantial evidence concerning it. State v. Hughes, 106 Wn.2d 176, 193, 721 P.2d 902 (1986) (citing Albin v. National Bank of Commerce of Seattle, 60 Wn.2d 745, 754, 375 P.2d 487 (1962) (the giving of the instruction indicates to the jury that the court must have thought there was some evidence on the issue)). Washington courts consistently follow this rule. See Columbia Park Golf Course, Inc. v. City of Kennewick, 160 Wn. App. 66, 90, 248

[3] The other instructions allowed the State to argue that theory. See CP 62 (Instruction 16); CP 63 (Instruction 17).

P.3d 1067 (2011); State v. Heath, 35 Wn. App. 269, 271, 666 P.2d 922 (1983); State v. Brown, 29 Wn. App. 11, 17, 627 P.2d 132 (1981). There was not substantial evidence that Williams acted out of revenge or retaliation.

The revenge/retaliation instruction is similar to a first aggressor instruction. "[T]he initial aggressor doctrine is based upon the principle that the aggressor cannot claim self-defense because the victim of the aggressive act is entitled to respond with lawful force." State v. Riley, 137 Wn.2d 904, 912, 976 P.2d 624 (1999). The revenge/retaliation instruction is based on the similar principle that a person cannot claim self-defense if he or she acted out of revenge or retaliation. "[T]he right of self-defense does not imply the right of attack in the first instance or permit action done in retaliation or revenge." People v. Dillon, 24 Ill. 2d at 125 (emphasis added) (quoted in Janes, 121 Wn.2d at 240).

Courts are required to use care in giving an aggressor instruction because it impacts a claim of self-defense, which the State has the burden of disproving beyond a reasonable doubt. State v. Riley, 137 Wn.2d at 910 n.2. For that reason first aggressor instructions are disfavored. State v. Birnel, 89 Wn. App. 459, 473, 949 P.2d 433 (1998) *overruled on other grounds* In re Pers. Restraint of Reed, 137 Wn. App. 401, 408, 153 P.3d 890 (2007). If substantial evidence does not support an aggressor

instruction the giving of the instruction is prejudicial because it prevents a defendant from claiming self-defense. See Birnel, 89 Wn. App. at 473-74 (aggressor instruction not supported by evidence "effectively deprived [defendant] of his ability to claim self-defense."); State v. Stark, 158 Wn. App. 952, 960-61, 244 P. 3d 433 (2010), *review denied*, 171 Wn.2d 1017, 253 P.3d 392 (2011) ("without supporting evidence to justify giving the aggressor instruction, the court prevented Ms. Stark from fully asserting her self-defense theory.").

The revenge/retaliation instruction in this case had a similar impact because it told the jury that self-defense does not permit an action done in revenge or retaliation and the State used the instruction to argue Williams was not entitled to his defenses.[4] The State did not argue that substantial evidence supported the instruction when it requested the instruction. It does not argue in its brief the instruction was supported by substantial

[4] The State claims Williams misrepresents the State's closing argument. BOR at 5. The State in fact used the instruction to argue that self-defense is an act of necessity and that Williams was not entitled to his defenses. "And then finally, Instruction 26, the word reasonable comes home to roost there in Instruction 26. And that's the instruction that says, self-defense does not permit retaliation or revenge. And that's what we have here, it's a revenge killing. The defendant's upset about getting beaten once, he's upset about getting beaten twice, and he takes the fight to Mr. Guerra for the third round, and the defendant's the winner of the third round." RP 2586.

"Instruction No. 26, justifiable homicide committed in defense of a slayer or self-defense is an act of necessity. The right of self-defense does not – does not permit action done in retaliation or revenge." RP 2691.

evidence. Without supporting evidence to justify giving the instruction, the court prevented Williams from fully asserting his self-defense theory.

2. THE STATE'S IMPROPER CLOSING ARGUMENT REQUIRES REVERSAL.

The State correctly concedes the prosecutor's argument was improper and it does not dispute that on multiple occasions our courts have condemned similar arguments. BOR at 24, 26; see BOA at 31-34 (citing cases where this type of argument has been held improper). The State asserts that a curative instruction would have ameliorated the prejudice resulting from the argument, and because Williams did not object and request a curative instruction the error is waived. BOR 29. In support of its assertion the State claims the decision in State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012) controls. BOR at 27-29. Emery, however, is different than this case.

Here, unlike in Emery, the issue was self-defense. Where the defense is self-defense the State is obligated to prove the absence of self-defense beyond a reasonable doubt. By implying the jury had to find a reason in order to find Williams not guilty made it seem that the jury had to find an objective reason why Williams believed it was necessary to defend himself and his wife. That is contrary to the law on self-defense where "the defendant's actions are to be judged against [his] own

subjective impressions and not those which a detached jury might determine to be objectively reasonable." State v. Wanrow, 88 Wn.2d at 240. Telling jurors they need to come up with a specific reason they believed it was objectively reasonable for Williams to shoot at the assailants effectively implied Williams was not entitled to the presumption of innocence and it shifted the burden to Williams to prove he acted in self-defense and in defense of his wife. See State v. Anderson, 153 Wn. App. 417, 424, 220 P.3d 1273 (2009) (noting that a similar argument improperly implied the jury had an affirmative duty to convict).

Further, the Emery Court noted that the evidence of guilt was "very strong, probably overwhelming." Emery, 174 Wn.2d at 764, n.14. The same cannot be said in this case. Both Williams and his wife were repeatedly assaulted and Williams fired the shots only a few minutes after the assaults while Guerra, one of his assailants, walked towards him with what Williams believed was an object in his hands and cutting off Williams's access to his wife. RP 2149-2155. There was not overwhelming evidence that Williams did not act from a reasonable belief that he or his wife faced imminent serious bodily harm.[5]

The State also dismisses Williams's argument that a curative instruction would have conflicted with the standard reasonable doubt

[5] The State admits the evidence in this case was not as "probably overwhelming" as the evidence in Emery. BOR at 28.

instruction because Williams "does not cite any authority for this argument...." BOR at 26. The State is correct that there are no cases that directly address this proposition. But, it is apparent that a curative instruction addressing the State's improper closing argument would have created confusion because of the language in the standard reasonable doubt instruction. The plain language of the standard reasonable doubt instruction states "a reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence." (CP 50). A reasonable juror could read the instruction to require a reason for the doubt as opposed to a doubt based on reason. Thus, any curative instruction telling the jury it did not need to articulate a reason to find Williams not guilty would have conflicted with that instruction.

B. CONCLUSION

For the foregoing reasons and the reasons in Williams's opening brief his convictions should be reversed and his case remanded for a new trial.

Dated this 26 day of September 2017.

Respectfully submitted

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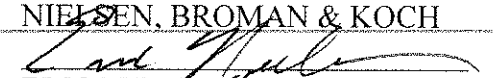

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